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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 871.

MICHELA GRAND, DANIEL POLLOCK, JAMES PEAKE, JR.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Respondent feels it necessary to state additional facts, since the facts as stated by Petitioners are incomplete.

The convictions of petitioners grew out of activities occurring on October 7, 1963. On that day, prior to the entry into the bank of these petitioners, picketing had been conducted outside the bank (T. G. 59, 67, 190). At least one of the individuals named as a defendant in the in-

junction suit (Reverend Charles Perkins) participated in the picketing (T. G. 60). This was shown by photographic exhibits (T. G. 162). Photographic evidence also showed that prior to the acts of petitioners for which they were convicted, placards and signs identifying the picketers as being members of CORE were carried about outside the bank (T. G. 163). Another of the individuals named as defendant (Lucien Richards) walked in the picket line outside the bank (T. G. 190). Further, Richards was observed giving money to two girls, and was heard instructing the girls to open accounts at the bank, prior to the acts committed by petitioners (T. G. 272-273).

During the picketing, and prior to the entry into the bank by any of the petitioners, a statement was read over a loud-speaker calling attention to the restraining order, among other things (T. G. 283). Loud speakers carried the statement inside and outside the bank (T. G. 277). The reading of the statement began at 4:30 P. M. and ended about 5:00 P. M., and it was read approximately six times (T. G. 303).

Photostatic copies of the restraining order were posted about the bank; in particular copies were posted at both entrances to the bank (T. G. 54).

The first of these petitioners to enter the bank was Daniel Pollack. He entered the bank at approximately 4:45 P. M. (T. G. 176). He went to teller's window 10, and stood in front of that window (T. G. 177). He was then told by a police officer that he could not block the window, but "he just stood there" (T. G. 177-178). While he was standing there, a deputy sheriff handed him a copy of the restraining order (T. G. 262). Thereupon, Pollack sat on the floor of the bank, with a copy of the restraining order in his hand, until the police carried him out of the bank (T. G. 179). He sat on the floor for three to five minutes (T. G. 179).

Petitioner Grand entered the bank through the front door and went to window 10 (T. G. 333). She was asked if she was a customer of the bank, but she made no reply (T. G. 333). She was asked to leave the bank, but again made no reply (T. G. 334). While she was standing at that window, a deputy sheriff handed her a copy of the restraining order (T. G. 261). She then sat on the floor and remained there until the police carried her out (T. G. 181).

Petitioner Peake was in a wheelchair being pushed by one Jim Lang (T. G. 250). He entered the bank twice (T. G. 308). On the second entry, he was wheeled through the north door and brought to a position in the main lobby of the bank (T. G. 308). He was then engaged in conversation by a police officer, the bank president and by another bank officer (T. G. 309). Previously, outside the bank, he stated to a reporter that he would disobey the law, "if it will further the Negroes rights" (T. G. 185). He told a bank officer that he was a demonstrator, and he stated that he had no business in the bank (T. G. 309). He was then handed a copy of the restraining order (T. G. 237, 309), as was Jim Lang (T. G. 250). After receiving the copy of the order, he was asked to leave by Police Major Eitzman (T. G. 29), by the president of the bank (T. G. 79), and by another bank officer (T. G. 309). He remained in the same position until taken from the bank by police officers (T. G. 29).

QUESTION PRESENTED.

Certiorari should be denied petitioners on their claim that they were denied fundamental federally guaranteed Constitutional rights when they were convicted of criminal contempt for violating a restraining order to which they were not parties although having knowledge of the issuance of and having been served with a copy of said restraining order.

POINTS AND AUTHORITIES.

Certiorari should be denied petitioners on their claim that they were denied fundamental federally guaranteed Constitutional rights when they were convicted of criminal contempt for violating a restraining order to which they were not parties although having knowledge of the issuance of and having been served with a copy of said restraining order.

Yakus v. U. S. (1943), 321 U. S. 414;
Whitney v. California (1926), 274 U. S. 357;
In re Coggshall (1903), 100 Mo. App. 585, 75 S. W. 183;
Ex parte Dillon (1936, Mo. App.), 96 S. W. 2d 1095;
Engel Sheet Metal Equipment v. Shewman (1957, Mo. App.), 307 S. W. 2d 694, l. c. 696;
Ex parte Lennon (1891), 166 U. S. 548;
Chisolm v. Caines (1903, C. C. 4th), 121 F. 397, l. c. 401.

Miscellaneous.

17 Corpus Juris Secundum 92, Contempt, Sec. 33.

ARGUMENT.

The contention of Petitioners that they were not bound by temporary restraining order because they were not parties, privies or members of a class was never presented to the District Court for review.

Appropriate to consideration of this claim is the pronouncements of this Court in **Page v. United States,** 282 F. 2d 807 (1960). There it was said, to wit:

> . . . It has always been the rule that, in order to prevent a miscarriage of justice, a federal appellate court, in the exercise of a sound discretion, may notice plain and vital errors occurring during the trial of a criminal case, although not preserved for review by objection or exception. **Wilborg v. United States,** 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289; **Crawford v. United States,** 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465; **Whitney v. People of State of California,** 274 U. S. 357, 380, 47 S. Ct. 641, 71 L. Ed. 1095; **Ayers v. United States,** 8 Cir., 58 F. 2d 607, 608-609. But the power of a reviewing court to consider a question first presented on appeal is an exception to the rule that such a court will not consider errors not objected to at the trial. **Lamento v. United States,** 8 Cir., 4 F. 2d 901, 904. A trial judge ordinarily should not be held to have erred in not deciding correctly a question that he was never asked to decide.

Moreover, a review of the documents addressed to relief by way of habeas corpus in the St. Louis Court of Appeals and the Supreme Court of Missouri will also prove that such present claim of error was never asserted prior (R. St. Louis Court of Appeals—Applications for Writ of Habeas Corpus, Case Nos. 31,777-31,779; Supreme Court

of Missouri, Applications for Writ of Habeas Corpus, Case Nos. 50,596-50,598). Under such a condition of the Record, Respondent suggests that the language of the Supreme Court of the United States addressed to this point in **Whitney v. California** (1926), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095, is applicable, to wit:

> It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court.

In Page v. United States, supra, this Court recognized the still binding force of the Whitney rule (immediately foregoing) in relying upon **Yakus v. United States** (1943), 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834. This Court pointed out the following teaching from Yakus (U. S. 444-445), to-wit:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. **O'Neil v. State of Vermont,** 144 U. S. 323, 331, 12 S. Ct. 693, 696, 36 L. Ed. 450; **Barbour v. State of Georgia,** 249 U. S. 454, 460, 39 S. Ct. 316, 317, 63 L. Ed. 704; **Whitney v. People of State of California,** 274 U. S. 357, 360, 362, 380, 47 S. Ct. 641, 642, 643, 650, 71 L. Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. **Seaboard Air Line Ry. Co. v. Watson,** 287 U. S. 86, 53 S. Ct. 32, 77 L. Ed. 180. While this Court in its discretion sometimes departs from this

rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see **Brandeis, J.** concurring in **Whitney v. People of State of California**, supra, 274 U. S. at page 380, 47 S. Ct. at page 650, 71 L. Ed. 1095, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare **Woolsey v. Best**, 299 U. S. 1, 57 S. Ct. 2, 81 L. Ed. 3, with **Ex parte Siebold**, 100 U. S. 371, 25 L. Ed. 717.

Upon the basis of the above authorities this court ought not to entertain the claim of a denial of fundamental Federally guaranteed constitutional rights when raised for the first time in the United States Court of Appeals for the Eighth Circuit.

With regard to Petitioners' assertion that they are not, "parties, privies or members of [the] class," Respondent urges that this contention is erroneous. It is apparent that the assertion is premised upon Petitioners' too-limited comprehension of the inclusion of the plaintiff's petition and the Circuit Court's temporary restraining order. This appears throughout the argument and is patently demonstrated by the assertion (Petitioners' Brief, p. 11) that:

> "Petitioners in this case were not parties to the injunction nor members of CORE and therefore were not bound by the injunction issued in **Jefferson Bank and Trust Company v. Curtis et al.**"

Implicit in this fallacious limitation of the restrained class is the belief that the Petitioners must satisfy organic formal membership requirements of the Committee of Racial Equality to be the object of the suit or the order of the court. This overlooks the realities of the petition and the decisional law applicable. The class included within the petition is all or any persons or person fairly represented by the individually identified defendants. Who these in-

individuals legally represent is to be gathered from the recitals of the petition. There they are identified by reference to their common plan and design to act in concert to carry out the threats to enforce the stated demand. This class, from the nature of the situation, was not limited in either numbers (i. e., persons) or time.

The Petitioners' participation in the common plan and design, by their commission of the prohibited acts, after notice of the restraining order, was sufficient under Missouri law to render them amenable to punishment for criminal contempt. Illustrative of this is **In re Coggshall** (1903), 100 Mo. App. 585, 75 S. W. 183. There the court sustained a criminal contempt conviction for violation of a restraining order and held that it was unnecessary that the contemnor be a "named party" to the bill. Similarly, a like rule was applied in **Ex parte Dillon** (1936), 96 S. W. 2d 1095. There it was said, to wit:

> . . . [2, 3] The contention of petitioners that the injunction of the court was not valid against them and that they were not liable to the penalties of contempt for the violation thereof for the reason that they were not parties to the suit in which the order of injunction was made and were never served with any legal process so as to give the court or the judge thereof jurisdiction over them in said matter cannot avail them, as the rule in this state is that one is amenable to an injunction although not a party to the suit in which it was issued and although not actually served with process therein, if it be made to appear that such one had notice of such injunction and thereafter violated the same. **In re Coggshall,** 100 Mo. App. 585, 75 S. W. 183. . . .

In **Engel Sheet Metal Equipment v. Shewman** (1957, Mo. App.), 307 S. W. 2d 694, l. c. 696, the rule was reaffirmed in the following language, to wit:

> . . . Consequently, one who, with notice, participates in acts in violation of an injunction is guilty of contempt and the fact that he was not a party to the action, or actually served with a copy of the injunction, will not relieve him. **Middleton v. Tozer**, Mo. App., 259 S. W. 2d 80. . . .

It is apparent that the Federal courts follow the same rule. **Chisolm v. Caines** (1903, C. C. 4th), 121 F. 397, l. c. 401, makes a clear exposition of the responsibility of even strangers to the parties, who have actual notice of a court's order. (See also: **Ex parte Lennon** (1891), 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110.) Of interest also is the encyclopedic law restatement found at **17 Corpus Juris Secundum 92** (Contempt, Sec. 33), to wit:

> . . . Strangers who have knowledge or notice of an order, such as a restraining order, and who are the servants or agents of the person or class of persons against whom it is directed, or who act in collusion or in combination with such person or class of persons, are punishable in contempt for the violation of the order. . . .

Here, the Petitioners, with full and complete knowledge of the Court's order and the reasons and purposes thereof, acted in wilful and deliberate violation of the order. Further, their acts were the result of the execution of a common plan and design and community of interest to accomplish a common end by specific means in concert, association, combination and collusion with other members of the class to which they belonged.

CONCLUSION.

Petitioners fail to present any reasons why this Court should grant a review on writ of certiorari. They fail to state any important question of federal law which has not been but which should be decided by this Court. They

fail to cite any departure from accepted judicial standards by a lower court which calls for the exercise of this Court's power. They fail to show that the State Courts decided any federal question in a way so as to conflict with any decision of this Court. They fail to show any federal court decision in this case which is in conflict with any decision of this Court. They fail to show that the Court of Appeals' decision in any way conflicts with the decisions of any other Court of Appeals.

Petitioners failed to raise or fairly present the issues they now urge as the basis for seeking this Court's review.

Petitioners' convictions for criminal contempt by the State Court were based on state law. The procedures followed in obtaining these convictions complied in every respect with proper constitutional safeguards. There exists no grounds for the granting of a writ of certiorari and hence Petitioners' request should be denied.

Respectfully submitted,

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